INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	12

CITATIONS

Cases:

Agnew v. *United States*, 165 U. S. 36 — 12

Chadick v. *United States*, 77 F. (2d) 961, certiorari denied, 296 U. S. 609 — 9

Dunbar v. *United States*, 156 U. S. 185 — 10

Fall v. *United States*, 49 F. (2d) 506, certiorari denied, 283 U. S. 867 — 9

Hopt v. *Utah*, 120 U. S. 430 — 10

Malone v. *United States*, 94 F. (2d) 281, certiorari denied, 304 U. S. 562 — 9

McAffee v. *United States*, 105 F. (2d) 21 — 12

Parker v. *United States*, 203 Fed. 950 — 7

United States v. *Breen*, 96 F. (2d) 782, certiorari denied, 304 U. S. 585 — 9

United States v. *Miro*, 60 F. (2d) 58 — 11

United States v. *Murdock*, 290 U. S. 389 — 11

Wilson v. *United States*, 232 U. S. 563 — 10

Wilson v. *United States*, 190 Fed. 427 — 8

Statutes:

Revenue Act of 1934, c. 277, 48 Stat. 680:

Sec. 145 (U. S. C., Title 26, Sec. 145) — 2

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sec. 145 — 3

Sec. 187 — 3

129465—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN, ALIAS "ZENDEL" FRIEDMAN,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 629)[1] is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 6, 1941 (R. 630). The petition for a writ of certiorari was filed November 8, 1941.

[1] Record references are to the printed Appendix to the petitioner's brief in the court below.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See, also, Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in an income-tax prosecution based upon an individual return, the trial court erred in receiving in evidence a partnership return upon which the individual return was based; and whether the court erred in charging the jury that if it found that petitioner knew that a false partnership return was filed, it might consider that some evidence of an endeavor to evade the individual income tax.

2. Whether the trial court erred in instructing the jury with respect to reasonable doubt that to justify an acquittal it must be substantial and "not a mere possibility of innocence."

3. Whether the trial court erred in refusing to give a requested instruction as to the elements of the offenses on trial on the ground that it was otherwise covered by the instructions given.

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to

collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (U. S. C., Title 26, Sec. 145.)

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 145 (b) is identical with the above section.

SEC. 187. PARTNERSHIP RETURNS.

Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title and such other information for the purpose of carrying out the provisions of this title as the Commissioner with the approval of the Secretary may by regulations prescribe, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

STATEMENT

The petitioner, a gambler of Atlantic City, New Jersey (Pet. 3; R. 553, 575–585), was indicted in the United States District Court for the District

of New Jersey (R. 9–17), and, after a trial before Judge Biggs and a jury (R. 27–574), was convicted of wilful attempts to evade and defeat his individual income taxes for the years 1935, 1936, and 1937, by failing to file returns and by filing false delinquent individual returns (R. 9–17, 626), in violation of Section 145 (b) of the Revenue Acts of 1934 and 1936, *supra*. Total sentences of ten years in a penitentiary and fines aggregating $20,000 were imposed (R. 627).

The petitioner admittedly was a member of a partnership known as "Daniels, Williams & Friedman" which was engaged in the "numbers" business in violation of the State law (Pet. 3). For the year 1937 a return was filed for this partnership, showing net income of $14,742, in which the petitioner had a 50% interest, amounting to $7,371. This return was signed by Williams on March 14, 1938, and filed on March 15, 1938 (Ex. G–4, R. 587–589). The petitioner, on March 15, 1938, signed his individual income tax return for 1937 (Ex. G–3, R. 579–585). The individual return reported, among other items, on the line for partnership income, the sum of $7,371 received from "Daniels, Williams & Friedman" and total net income of $6,861.47 for that year (R. 579). The indictment alleged receipt of net income of $13,490.47 for 1937 (R. 15). During the trial these and other returns for prior years were offered and received in evidence without objection (R. 92–93), although at the

conclusion of all the evidence the petitioner objected to the admissibility of the partnership return and noted an exception (R. 546). There was no motion to strike, or to exclude the return from evidence.

With respect to the partnership return the trial court charged the jury that if it believed from the evidence that the partnership income was understated it might find that the income reported by the petitioner on his individual return was incorrect; and that if it should find that the petitioner knew that a false partnership return was filed, that may be considered as some evidence that he endeavored to evade his own income tax for that year [2] (R. 556). No exception was taken to this portion of the charge. (See R. 561–565.)

The trial court previously had instructed the jury that there were at least two elements in the crimes alleged: first, whether the defendant owed a tax, and secondly, whether he willfully attempted to evade or defeat that tax. It further instructed that such an attempt "is an essential element of the crime and must be proven beyond a reasonable doubt" [3] (R. 554–555). No exception was noted to this charge, although an exception was taken to the court's refusal to grant the petitioner's first requested charge (R. 558, 565; Pet. Br. 16).

---

[2] This portion of the charge is quoted in full, *infra*, p. 8.

[3] The court further charged the jury in this respect as shown at page 4 of the petition.

The trial court also instructed the jury with respect to reasonable doubt that "To justify acquittal it must be substantial in view of all the evidence and not a mere possibility of innocence."[4] An exception was noted (R. 565).

On appeal, the court below, on October 6, 1941, affirmed the judgment of conviction in a *per curiam* opinion, stating that an "examination of the record in this case fails to disclose any error which affected the substantial rights of the defendant" (R. 629).

ARGUMENT

The petitioner's contentions relate to the admissibility of the partnership return for 1937 and the charge of the trial court with respect to that return, the nature of reasonable doubt, and the elements of the offenses. These contentions are without merit.

---

[4] This portion of the charge (R. 557) reads:

"A reasonable doubt is not every doubt that may flit through your minds in considering the case. To justify acquittal it must be substantial in view of all the evidence and not a mere possibility of innocence. It must be a doubt arising out of the evidence. A reasonable doubt exists where after the full consideration of all the evidence, your minds are left in such a condition that you cannot say you feel an abiding conviction, to a moral certainty, of the truth of the charge or charges. A reasonable doubt is not a strained or fanciful conjecture raised to escape the necessity of rendering an unpleasant verdict, but an actual, sincere mental hesitation caused either by insufficient or unsatisfactory evidence."

I

Petitioner concedes that the partnership return "was admissible, subject only to being connected with the defendant and the crimes charged" (Pet. Br. 11). He contends, however, that the return was inadmissible for the reason that the record fails to disclose that he had guilty knowledge of, or participated in, its preparation or filing.

The return in question was an information return filed by the partnership as required by Section 187 of the Revenue Act of 1936, *supra*. (R. 587–589). As such it had a direct bearing upon the petitioner's individual income tax return for 1937, which formed the basis of the prosecution for that year (R. 14–17). It showed the source of his income and his 50% interest in the partnership (R. 587) and he reported and admitted this connection in his individual return (R. 579). The petitioner himself, therefore, invited comparison with, and consideration of, the partnership return and made it relevant and material. Further, the petitioner's partner, Daniels, testified that the partnership return was false (R. 422–423) and that just before it was filed he had told the petitioner "* * * I felt as though we were not filing our income correct * * *" (R. 408–409). The return in question, therefore, was clearly admissible. Cf. *Parker*

v. *United States,* 203 Fed. 950 (C. C. A. 2d); *Wilson* v. *United States,* 190 Fed. 427 (C. C. A. 2d).

Since the return was admissible, there is no basis for the additional contention of the petitioner that the court erred in instructing the jury that if it found "from all of the circumstances that the defendant knew that a false partnership return was filed," it might "consider that as some evidence that he endeavored to evade his own income tax for the year 1937."[5] Further, no exception was taken to this charge. It was not specified as a ground of appeal (R. 600–602) or an assignment of error (R. 603–618) and was not argued in the court below.

---

[5] The full instruction is as follows (R. 555–556):

"For the year 1937, the defendant filed an income tax return on time, and it is for you to determine whether that return was correct or fraudulent. For that year a partnership return was *filed by the defendant and his partners,* Daniels and LeRoy Williams. This return reported approximately $148,000 gross business. There has been testimony that the gross business for 1937 was between $255,000 and $312,000. If you believe from the evidence that the gross business of the partnership was substantially in excess of that reported on this partnership return, and that as a result the net income reported on the return was less than the true net income, you may find that the income reported by the defendant on his individual return was incorrect. *If you find from all of the circumstances that the defendant knew that a false partnership return was filed, you may consider that as some evidence that he endeavored* to evade his income tax for the year 1937. [Italics supplied.]

The point, therefore, is not available on appeal. *United States* v. *Breen,* 96 F. (2d) 782 (C. C. A. 2d), certiorari denied, 304 U. S. 585.

Moreover, this instruction, conditioned as it was upon a finding that the petitioner knew that a false partnership return was filed, was unexceptionable. The petitioner was charged with having knowingly received $14,000 from the "numbers" business, and wilfully and knowingly attempting to evade and defeat the income tax due thereon. (R. 14–17.) The partnership return reported gross income of $148,143, and the petitioner's share of net income as $7,371 (R. 587). There was evidence that the gross business was between $255,000 and $312,000. (R. 556.) The petitioner's partner, Daniels, told him that he felt they were not filing their income correctly (R. 408–409). A scheme or system of handling gambling income was involved and the question of the petitioner's knowledge, motive and intent in filing an individual return based upon the partnership return was correctly submitted to the jury. *Chadick* v. *United States,* 77 F. (2d) 961 (C. C. A. 5th), certiorari denied, 296 U. S. 609; *Fall* v. *United States,* 49 F. (2d) 506, 512–513 (App. D. C.), certiorari denied, 283 U. S. 867; *Malone* v. *United States,* 94 F. (2d) 281 (C. C. A. 7th), certiorari denied, 304 U. S. 562.[6]

[6] The petitioner, referring to the first italicized phrase in the charge in question also complains that the court invaded the province of the jury by stating that the return was in fact filed by the petitioner. When viewed in relation to the entire

II

The petitioner also contends that the trial court erred in instructing the jury in part that "To justify an acquittal it [reasonable doubt] must be substantial in view of all the evidence and not a mere possibility of innocence" (R. 557; Pet. 5–6; Br. 13–15). This statement, of course, must be considered in its relation to the entire charge with respect to reasonable doubt. (See footnote 4, page 6, *supra.*) The court instructed the jury, affirmatively, that "A reasonable doubt exists where after the full consideration of all the evidence, your minds are left in such a condition that you cannot say you feel an abiding conviction, to a moral certainty, of the truth of the charge or charges" (R. 557). Certainly the court was justified in advising the jury what did *not* constitute a reasonable doubt, and the charge given was correct. *Wilson* v. *United States,* 232 U. S. 563, 569–570; *Dunbar* v. *United States,* 156 U. S. 185, 199; *Hopt* v. *Utah,*

---

charge, as of course it must be, the phrase in question obviously lends itself to no such criticism. It was employed simply to identify the return as the one made on behalf of the partnership. Any possible doubt as to its meaning is removed by the second italicized portion of the charge relating to a false return. Further, the return, in law and in fact, was filed by the partnership of which the petitioner was a member, and it was therefore filed by the partners, as stated by the court. (R. 555–556.) As the return was in accordance with the petitioner's return, and was not received as an admission of additional tax liability, it is immaterial who physically caused the return to be filed.

120 U. S. 430, 439–440. The decisions relied upon by the petitioner (Pet. 7, Br. 13–15) are not in point.

III

The petitioner also contends that the trial court erred in failing to advise the jury that before finding the petitioner guilty it must be satisfied beyond a reasonable doubt that the Government has proved each and every element of the offense (Pet. 7, Br. 15–17). As shown by the Statement, *supra,* page 5, and page 4 of the petition, the court carefully, fully and correctly analyzed the charges on trial, and, in substance, gave such an instruction (R. 554). *United States* v. *Murdock,* 290 U. S. 389, 394; *United States* v. *Miro,* 60 F. (2d) 58, 61 (C. C. A. 2d). The court then, by way of summary, repeated that "* * * a wilful attempt to evade and defeat payment of the tax is an essential element of the crime and must be proven beyond a reasonable doubt" (R. 555). As shown above, it further elaborated upon "reasonable doubt" (R. 557). In addition, the court granted the petitioner's second, fourth and sixth requested instructions, which further analyzed the elements of the offenses and definitely stated that the burden was upon the Government to show an intentional and wilful evading of the tax (R. 559). In view of these instructions, the petitioner's complaint can

only be that the court did not specifically state that the jury must be persuaded beyond a reasonable doubt that the petitioner owed a tax in excess of that reported. Clearly, however, the jury could not have possibly found beyond a reasonable doubt that the petitioner wilfully evaded his taxes without first finding beyond a reasonable doubt that he owed such taxes.

The suggestion that the charge with respect to wilfulness was confusing and contradictory (Pet. 6, Br. 17) is obviously without merit.

Accordingly, we submit that the requested instruction (Br. 16), which in itself was bad because vague and indefinite, was correctly refused for the reason stated, namely, "it was covered in the main charge" (R. 558) and in the petitioner's other instructions which were given (R. 559). The court was not required to charge in the exact language requested or to repeat instructions already given. *Agnew* v. *United States,* 165 U. S. 36, 51.

McAffee v. *United States,* 105 F. (2d) 21, 30 (App. D. C.), upon which petitioner apparently places his chief reliance (Pet. 7, Br. 16–17), involved a requested instruction with respect to reasonable doubt which "was not given either in terms or in substance in the charge."

CONCLUSION

The decision below is in all respects correct. There is presented neither an important question

nor a conflict of decisions. It therefore is respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.

J. LOUIS MONARCH,
Acting Assistant Attorney General.

GORDON B. TWEEDY,
EARL C. CROUTER,
Special Assistants to the Attorney General.

DECEMBER 1941.

U. S. GOVERNMENT PRINTING OFFICE, 1941

Office - Supreme Court, U. S.
FILED
JAN 3 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES.

JOHN H. BURNETT,
HARRY LEVIN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI

The Supplemental Memorandum For The United States is addressed to the point raised in petitioner's Question 1. We there contended that a Partnership Return of Income was not admissible in evidence against a partner indicted for willful evasion of his individual income tax, unless it was established [1] that the indicted partner either had guilty

[1] That is, established sometime before the case goes to the jury. As an official public record, produced by its lawful custodian, the Partnership Return was admissible, subject to being properly connected with the crime charged. The Partnership Return was not exhibited to the jury when it was first admitted (R. 92-3). The jury did not know its purport until advised thereupon by the instructions of the trial court. (R. 555-6). However, before the trial court so instructed the jury, timely objections were made to the admissibility of the Partnership Return (R. 398-407, 546). The suggestion that petitioner should have moved to strike the document is a step backward by the Government. Is not such a motion one of those highly technical tactics, which have been so frequently classified as archaic machinations of the common law?

knowledge of the Partnership Return, or was an accessory before or after the fact to the preparation, making, signing or filing of the Partnership Return. In its Supplemental Memorandum, the Government relies on "three circumstances" which make the Partnership Return admissible, (1) "the relationship between the partnership return and the petitioner's individual return"; (2) "the false statements contained in the former (partnership return) as to the partnership income and the partners' distributive shares;" and, (3) "the petitioner's knowledge of the incorrectness of the partnership return contemplated to be filed." (Memo. p. 2).

(1) "The relationship between the partnership return and the petitioner's individual return" is so distant that the degree of kindred can only be likened to a friend of the family who has been dubbed "cousin."

(2) "The false statements contained in the former (partnership return) as to partnership income and the partners' distributive shares" can only bind the defendant if and when he has been shown to have been a party thereto. Was the egg from the hen or the hen from the egg? Was the petitioner's individual return from the partnership return or was the partnership return from the individual return? There is an utter lack of a casual connection between the partnership return and the individual return.

(3) "The petitioner's knowledge of the incorrectness of the partnership return contemplated to be filed" was nil. True, the partners discussd *a* partnership return before any was filed. (R. 408). But, the partners were in disagreement as to the manner of making *a* return. The witness Daniels, (R. 409):

> I said I thought we were not filing the income tax correct and Rubenstein, who was in the presence of Friedman (petitioner), said that we were filing them correct as separate partners and *both of us thought we were right.*

Was the partnership return which was offered in evidence

the one of which the witness Dainels was speaking or the one of which Rubenstein was speaking?

Was the partnership return filed by Williams (R. 587) and admitted against this petitioner ever discussed with petitioner?

Leroy Williams "prepared the (partnership) return for 1937" and "got the figures together" (R. 410). Aside from suspicion, that is all that was proved in order to connect the petitioner with the Partnership Return.

It must be conceded that most of the sordid details of the criminal syndicate showing financial gain to the petitioner were admissible to prove his individual income and the falsity of his individual income tax return. However, that field has certain boundaries. No matter how damning those details were, before the partnership return was admissible, it had to have some probative force, some probative value.

The intimacy of the petitioner with the criminal activities of the syndicate could not prove his intimacy with the partnership return. Otherwise, we have an inference upon an inference, which is inadmissible.

The memorandum of the Government attempts to demonstrate that the partnership return was admissible because of circumstantial evidence. To prove motive and intent by circumstantial evidence, the circumstances adduced—either words or conduct,—must also have some probative value, and be capable of sustaining the belief of the jury that such fact or facts form a reasonable presumption or inference as to the principal fact in dispute.

Unquestionably, the partnership return was crudely false, prepared in order to defraud the government, filed with intent to evade taxes, and to hoodwink the Government, if possible.

Yet, there is an entire lack of competent evidence to prove that the petitioner had knowledge of or was a party to the preparation or the filing of that partnership return.

Nevertheless, it was admitted and characterized by the court as "filed *by the defendant* and his partners" (R. 555)

and the jury was told that it could be considered "as some evidence that he (petitioner) endeavored to evade his own income tax" (R. 556).

Petitioner was not charged with the offense of gaming. If he had been so charged, the labored reasoning of the Government's Supplemental Memorandum would be overwhelming.

The partnership return was, therefore, inadmissible and the instructions of the court thereon were error.

Respectfully submitted,

JOHN H. BURNETT,
HARRY LEVIN,
Counsel for Petitioner.